UNTIED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Region 21

RIM HOSPITALITY, Respondent, and NELSON CHICO, an Individual Charging Party.	Case 21-CA-137250

RESPONDENT RIM HOSPITALITY'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board ("NLRB" or "Board"), RIM Hospitality ("Respondent") respectfully excepts to the Decision of the Administrative Law Judge ("ALJ"), dated June15, 2016, as follows.

Exceptions to the Decision of the ALJ

Respondent respectfully excepts to:

1. The finding that "preponderance of the evidence supports that General Counsel's contention that Respondent's mandatory arbitration agreement was a condition of employment at the hotel at the time Chico and other former Crestline employees signed it in October 2011. (ALJ Dec., 3:25-27.)
2. The legal conclusion that an employer is required to "indicate…that the employees could remain employed without signing the agreement" for an arbitration agreement to be deemed non-mandatory. (ALJ Dec.. 3:34-40.)
3. The finding that "the agreement does not clearly state that signing is not required as a condition of employment." (ALJ Dec., 4:4-5)
4. The application to this case of "*Waffle House, Inc.,* 363 NLRB No. 104 (2016), where the employer argued that its mandatory arbitration agreement was voluntary, even though the agreement expressly stated that signing was a mandatory condition of employment, because employees could decline employment and choose to work for a different employer; and *San Fernando Post-Acute Hospital,* 363 NLRB No. 57 (2015), where the employer acknowledged that its mandatory arbitration agreement was a condition of employment, even though the agreement expressly stated that signing was voluntary. (ALJ Dec., 4:22-5:5.)
5. The implied finding that Respondent used the term "voluntary" for the purpose of misleading Chico and that Chico would reasonably have believed that the agreement was actually mandatory. (ALJ Dec., 4:22-5:9.)
6. The finding, "As for the fact that some employees have not signed the agreement over the past 4–5 years, this does not establish that some of the former Crestline employees signed

it in October 2011. Nor does it establish that none of the employees interpreted the word 'voluntary' in the mechanical manner described above." (ALJ Dec., 5:17-20.)

7. The legal conclusion that "the actual subjective manner in which Chico and others interpreted the agreement in October 2011 is not relevant or determinative." (ALJ Dec., 5:21-22.)
8. The legal conclusion that "the reasonableness test is an objective one; thus, the actual subjective manner in which Chico and others interpreted the agreement in October 2011 is not relevant or determinative." (ALJ Dec. 5:22-26.)
9. The legal conclusion that "mandatory individual arbitration agreements that are required as a condition of employment" are unlawful. (ALJ Dec., 5:40-41.)
10. The legal conclusion that the ban on individual arbitration agreements extends to optional agreements. (ALJ Dec., 5:42-6:17.)
11. The legal conclusion that "the maintenance of a mandatory arbitration agreement is unlawful, even if it is silent regarding class or collective claims, if the employer has applied the agreement to preclude employees from pursuing employment-related claims on a class or collective basis in any forum." (ALJ Dec., 6:21-30.)
12. The finding that "Respondent applied its mandatory arbitration agreement." (ALJ Dec., 6:30-31.)
13. The finding and legal conclusion that "Respondent's maintenance of the agreement violated the Act even though the agreement did not expressly prohibit such class or collective actions." (ALJ Dec. 6:31-33.)
14. The legal conclusion that "enforcing a mandatory arbitration agreement … to compel individual arbitration of an employee's claims is itself a violation of the Act." (ALJ Dec., 7:4-6.)
15. The legal conclusion that Respondent's constitutional right to petition the court is not unconstitutionally burdened by the Board's position that enforcing an arbitration agreement compelling individual arbitration violates the Act. (ALJ Dec., 7:4-10.)

16. The legal and factual conclusion that "Respondent's July 31, 2014 petition to compel individual arbitration of Chico's wage claims pursuant to the unlawful arbitration agreement was also unlawful." (ALJ Dec., 7:10-12.)

17. The legal conclusion that Respondent's arguments: (1) "that Chico's class action suit did not constitute protected concerted activity under the Act; (2) that Chico lacked standing to file the ULP charge; (3) that Chico did not file the ULP charge within the 6- month limitations period after he signed the arbitration agreement; and (4) that the complaint is barred under the doctrine of res judicata," lack merit. (ALJ Dec. 7:16-23.)

18. The legal conclusion that "filing of an employment-related class or collective action by an individual constitutes concerted activity under the Act." (ALJ Dec., 7:23-24.)

19. The legal conclusion that "former employees are protected by the Act and may file ULP charges over their former employer's post-termination maintenance and enforcement of an individual arbitration policy." (ALJ Dec., 7:25-26.)

20. The legal conclusion that "a violation may be found where, as here, an unlawful provision has been maintained and/or enforced within 6 months of the charge, regardless of when the provision became effective or was first acknowledged by or enforced against the employee." (ALJ Dec., 7:27-32.)

21. The legal conclusion that "court decisions in related or collateral private litigation such as Chico's wage suit against Respondent are not binding on the Board under the doctrines of res judicata or collateral estoppel as it was not a party to that litigation." (ALJ Dec. 7:33-42 & n.8.)

22. The finding and legal conclusion that "Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act by:

    a. Maintaining a mandatory arbitration agreement at the hotel that, as applied, compels employees to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial; and

b. Seeking to enforce the foregoing mandatory arbitration agreement against Chico in his employment-related court suit from July 31, 2014 to February 3, 2016." (ALJ Dec. 8:3-11.)

23. The ALJ's Remedy. (ALJ Dec. 8:15-9:2)

24. The ALJ's Recommended Order. (ALJ Dec., 9:6-10:14.)

For the reasons and arguments set forth in Respondent's accompanying Brief in Support of Exceptions to the Decision of the Administrative Law Judge, Respondent respectfully requests that its exceptions be sustained.

Respectfully submitted,

Dated: July 13, 2016

LONG & LEVIT LLP

By: _____

Douglas J. Melton
Shane M. Cahill

ATTORNEYS FOR RESPONDENT
RIM HOSPITALITY

PROOF OF SERVICE

I, the undersigned declare:

I am a citizen of the United States and employed in San Francisco County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 465 California Street, 5th Floor, San Francisco, California 94104.

On July 13, 2016, I served the within document(s):

RESPONDENT RIM HOSPITALITY'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

☒ by transmitting via e-mail or electronic transmission the document(s) listed above to the person(s) at the e-mail address(es) set forth below.

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I electronically filed the above-mentioned document with the Regional Office of the NLRB. Executed on July 13, 2016, at San Francisco, California.

Jessica Urbina